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In the Supreme Court

OF THE

United States

749468
Sub. Ct.

OCTOBER TERM, 1946

No. 813

DENNY MARTINI and MILDRED MARTINI, individually and doing business as Lakeside Cut-Rate Liquor Store,

Petitioners,

vs.

PAUL PORTER, Price Administrator, Office of Price Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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PAUL PORTER, Price Administrator, Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Mildred Martini, individually and as doing business as the Lakeside Cut-Rate Liquor Store, and petitioner Denny Martini, petition that a writ of

certiorari issue to review a judgment (R. 295) entered against them on July 18, 1946, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that Court numbered and entitled, "No 11,082, Denny Martini and Mildred Martini, etc., Appellants, vs. Paul A. Porter, Price Administrator, Office of Price Administration, Appellee". The said judgment (R. 295) and Opinion and Dissenting Opinion (R. 277), reported in 157 Fed.2d 35, affirms a judgment (R. 17) for treble damages in the sum of $45,509 awarded respondent against petitioners by the U.S. District Court for the Northern District of California, Southern Division, on October 24, 1944, for a purported violation of a wholesale ceiling price on distilled spirits. The said Circuit Court of Appeals denied petitioners' petition for a rehearing of the cause on ~~October 26~~ September 25, 1946. (R. 296.)

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

In November, 1943, a complaint, and on November 24, 1943, an amended complaint (R. 2) were filed in the United States District Court below by the respondent Price Administrator against the petitioners seeking treble damages for alleged sales of distilled spirits claimed therein to have "exceeded the maximum price provided by the General Maximum Price Regulation" which sum trebled "equals $238,000". The facts out of which said claim arose are as follows:

The petitioner Mildred Martini, an individual doing a licensed retail distilled spirits business under the name and style of the Lakeside Cut-Rate Liquor Store, through the negotiations of her store manager husband, the petitioner Denny Martini, purchased from Murray A. Schutz, an individual doing a general licensed wholesale distilled spirits business under the name of the Distillers Distributing Co., two carlots of imported distilled spirits called Dunbar's Canadian Whiskey.

The petitioners thereafter sold certain quantities of the distilled spirits at retail which fetched them a sum of $15,169.70 in excess of what the trial Court believed was the *wholesale* rate of $37.61 per case taxpaid to which they were entitled under the provisions of a price order fixing $37.61 per case as the wholesale rate which first was issued and admitted into evidence, over petitioners' objections, during the course of the trial below. The petitioners were authorized to sell the spirits in unlimited quantities at retail because they had acquired the "wholesale liquor dealers stamp" provided for by Section 3254 of the Internal Revenue Code. All the sales were made by petitioners at their retail stores, deliveries being made there and also by presentation of warehouse receipts at the bonded warehouse where the bulk of the spirits were stored. The sales were made between July 26, 1943, and August 31, 1943. (R. 3.) The Price Administrator commenced a treble damage suit against them in November, 1943. The trial commenced before the trial Court, sitting without a jury, on June 13, 1944 (R. 27), and was continued from

time to time and was concluded on August 15, 1944. (R. 258.)

At the time of the sales made by the petitioners neither the Emergency Price Control Act, Sec. 205(e), nor the Price Administrator's Regulations fixed a price for the spirits in question or stated a formula by which the petitioners were to fix a price therein. Recognizing that Price Regulation No. 1499.3(c) was defective the Office of Price Administration on August 14, 1943, substituted for it Price Regulation No. 445, Sec. 5.4, 8 F.R. 11168, which provided a formula for fixing wholesale ceiling prices on whiskey. This formula was not made retroactive but was made applicable only to sales to be made after August 31, 1943. The petitioners' sales were made before that date. It had no application to the sales that had been made by the petitioners.

On June 27, 1944, during the course of the trial the Price Administrator offered in evidence (R. 234), over the objection of petitioners (R. 235), a price order (R. 240) especially made up and issued on June 24, 1944, for the purpose of supplying evidence therein. This price order fixed a wholesale ceiling price of $37.61 per case and a retail price of $50.02 per case on any and all sales of Dunbar's Canadian whiskey per specification that might be made in the *future* after August 31, 1943, by the petitioners. (R. 241.) The trial Court concluded that the petitioners ten months previous had sold at rates higher than that fixed for future sales by the price order and concluded that they were bound by the wholesale rate later set

forth in the price order and awarded the Price Administrator treble damages in the sum of $45,509.00. (R. 17.)

Thereafter, on March 10, 1945, the petitioners appealed (R. 20) from the judgment of the trial Court to the Ninth Circuit Court of Appeals which, thereafter, on July 18, 1946, affirmed the judgment, the majority opinion of that Court and the dissenting opinion of Denman, C.J. being filed on said date. (R. 277 and 292.) Petitioners' petition for a rehearing in that Circuit Court was denied on ~~October 28,~~ September 25, 1946. (R. 296.) Your petitioners seek a review of the Circuit Court's judgment affirming the judgment of the trial Court and a reversal thereof.

STATEMENT DISCLOSING BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The Supreme Court has jurisdiction to assume jurisdiction to review the decision of the Circuit Court of Appeals by writ of certiorari under the provisions of Judicial Code, Sec. 240(a), Title 28 USCA, Sec. 347(a).

The Ninth Circuit Court of Appeals had jurisdiction upon appeal to review the judgment of the District Court below under the provisions of Title 28 USCA, Sec. 225(a) (first).

The District Court below had jurisdiction over the cause under the provisions of Title 50 USCA, Sec. 925(c), and Title 28 USCA, Sec. 41(i) (a).

QUESTION PRESENTED.

The review sought herein presents the following question:

(1) Where the Price Administrator has failed to fix the ceiling price of spirits and has failed to prescribe a formula for the fixing of a price thereon may he institute and maintain any action, under Section 205(e) of the Emergency Price Control Act of 1942, Title 50 USCA, Sec. 925(e), and recover treble damages for a claimed overcharge on sales to ultimate consumers based upon a subsequent price order issued during the course of the trial which fixed maximum prices on spirits to be sold in the future but had no application to sales already made?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT AND PETITIONERS' SPECIFICATION OF ERRORS.

The petitioners rely upon the following reasons for the allowance of the writ of certiorari and specify the following as an assignment of errors, to-wit:

(1) The Circuit Court of Appeals for the Ninth Circuit has decided a federal question of national importance which heretofore has not been, but should be, settled by this Court. It has decided that the Price Administrator may first institute a suit for treble damages under a purported claim of authority of Sec. 205(e) of the Emergency Price Control Act and, thereafter, retroactively lodge authority in himself to sue and maintain such suit simply by enacting a

new price regulation and thereunder issuing a price order fixing prices on sales to be made in future but having no application to past sales. It also has decided that such a price order is entitled to controlling evidentiary weight as retroactively fixing ceiling prices on past sales. In so deciding that Court, in effect, confers capacity and authority upon the Price Administrator to sue and maintain a treble damage action which Congress has not conferred upon him. Such is prohibited by Sec. 1 of Article I of the Constitution for being a usurpation or unconstitutional delegation of legislative power. Such also is prohibited as an *ex post facto* law by Sec. 10 of Article I of the Constitution whether the treble damages awarded under Sec. 205(e) of the Emergency Price Control Act are penal or remedial in nature.

(2) The Ninth Circuit Court and the trial Court below, in holding the Price Administrator could maintain a treble damage action he had no power to commence simply by thereafter adopting a new regulation and thereunder issuing a price order fixing maximum sales prices on sales to be made in the future and in construing the same as having a retroactive price fixing power creating liability in the sellers for sales made long before the commencement of such suit and the issuance of such order, have legislated into *esse* a new rule of law and evidence violative of Sec. 1 of Article I of the Constitution.

(3) The Ninth Circuit Court has decided that Sec. 205(e) of the Emergency Price Control Act of 1942, as it read before it was amended on June 30, 1944,

was not void for being vague, indefinite and uncertain as to whom it authorized to sue for a claimed overcharge and as to what particular acts or standards of conduct would result in liability thereunder. It has also held that Sec. 205(e) of the Act was not void for containing an unconstitutional delegation of legislative power to Courts and to juries to declare who is entitled to sue thereunder and also to determine what acts thereunder may be deemed prohibited and give rise to civil liability. In so holding it upholds a delegation of legislative power which is prohibited by Sec. 1 of Article I of the Constitution. In so deciding it has decided these federal questions in a way in conflict with an applicable decision of this Court, namely, *U. S. v. Cohen Grocery Co.*, 255 U. S. 81.

(4) The Ninth Circuit Court has held that a release of one joint tort feasor jointly sued with petitioners under Sec. 205(e) of the Emergency Price Act, as it read until June 30, 1944, does not operate as a release of all joint tort feasors even though the damages awardable thereunder are remedial in nature and also that the trial Court's finding exonerating the petitioners' agent for tort does not exonerate the petitioner principals from liability for their agent's tort. In so holding it has decided a question of federal law in a way in conflict with the great weight of authority in this country.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, the petitioners pray that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court, "No. 11,082, Denny Martini and Mildred Martini, individually, and doing business as Lakeside Cut-Rate Liquor Store, Appellants, v. Paul A. Porter, Price Administrator, Office of Price Administration, Appellee", to the ends that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that your petitioners have such other and further relief in the premises as may seem just.

Dated, San Francisco, California,
December 20, 1946.

WAYNE M. COLLINS,
Counsel for Petitioners.

THEODORE TAMBA,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari, together with the hereinafter supporting brief is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
December 20, 1946.

WAYNE M. COLLINS,
Counsel for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

DENNY MARTINI and MILDRED MARTINI, individually and doing business as Lakeside Cut-Rate Liquor Store,
Petitioners,

vs.

PAUL PORTER, Price Administrator, Office of Price Administration,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

The jurisdictional statement, including the dates of entry of judgments and opinions of the District and Circuit Courts below, the citations to the pages in the record where found and where reported, the statute under which jurisdiction is invoked and statement of the grounds on which the jurisdiction of this Court

is invaded, and a statement of facts and specification of errors are contained in the petition for certiorari herein.

II.

STATUTE AND ORDER, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED HEREIN.

Section 205(e) of the Emergency Price Control Act of 1942, Title 50 USCA, Sec. 925(e), the application and validity of which are involved herein, reads, in part, as follows:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, * * * except as hereinafter provided, bring an action against the seller on account of the overcharge * * * If * * * the buyer either fails to institute an action * * * or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States * * *"

The order of the Price Administrator dated June 24, 1944, establishing a wholesale and a retail price on the distilled spirits involved herein, the application and validity of which are involved herein, is set forth in the record at page 240, and also at page 282.

III.

ARGUMENT.

POINT ONE.

NO PRICE CEILING WAS VIOLATED.

The trial Court awarded treble damages to the Price Administrator on a finding that petitioners had sold spirits in violation of Sec. 205(e) of the Act. That section provides for a recovery of treble damages from a person selling a commodity "who violates a regulation order or price schedule prescribing a maximum price or maximum prices" * * * "on account of the overcharge."

For an "overcharge" to have been made there must have been a pre-existing maximum price established and the petitioners must have sold their spirits at prices in excess of that maximum price. No such maximum price had been established. The maximum price, if established at all, must be one established under Regulation 1499.3(c). As pointed out by Denman, C. J., in his dissenting opinion, R. 292, Regulation 1499.3(c) neither fixed a maximum price nor a method or formula by which the petitioners could fix a price. In consequence, no regulation was in existence by which a maximum price could be determined for the purpose of computing the "overcharge" referred to in Sec. 205(e). In short, there was neither a price ceiling fixed on the spirits in question at the time the petitioners sold the spirits nor any method or formula by which any overcharge could be computed. There was no price ceiling fixed or fixable on

the spirits. Therefore, the petitioners did not and could not violate the Act. In consequence, the judgment of the trial Court and of the Circuit Court below should be reversed.

The Office of Price Administration recognized the defect in Sec. 205(c) and on August 14, 1943, substituted for it Price Regulation No. 445, Sec. 5.4, 8 F. R. 11168, which prescribed a formula whereby the maximum wholesale price of whiskey could be calculated. This formula was not made retroactive but was made applicable only to sales to be made after August 31, 1943. All of the petitioners' sales had been made before that date.

On June 27, 1944, during the course of the trial the Price Administrator offered in evidence (R. 234), over the objection of petitioners (R. 235), a price order (R. 240) which was especially drawn up and issued on June 24, 1944, for the purpose of supplying evidence in the cause. The document was admitted into evidence. This price order purports to fix a wholesale ceiling price of $37.61 per case and a retail ceiling price of $50.02 per case on any sales of Dunbar's Canadian whiskey per specification that might be made by the petitioners in the future from and after August 31, 1943. (R. 241.) The trial Court concluded that the petitioners ten months previously had sold at rates higher than that fixed for future sales by the price order and that they were bound by the wholesale rate later set forth in the price order and awarded the Price Administrator treble damages in

the sum of $45,509. (R. 17.) It even disregarded the retail rate.

In holding that the price order was admissible in evidence the Courts below justify its admissibility on two grounds, namely, (1) its issuance by the Price Administrator lodged authority in him to maintain the suit already commenced and (2) it was entitled to controlling evidentiary weight as retroactively fixing ceiling prices on past sales for which there was neither a ceiling price fixed nor a formula by which a ceiling price could be established. In so holding the Courts below, in effect, have sought to confer both a capacity and an authority upon the Price Administrator to maintain a treble damage action which Congress has not conferred upon him under Sec. 205(e) and which he was not authorized to commence under the Act. Such is prohibited by Section 1 of Article I of the Constitution as being a usurpation of legislative power. Such is also forbidden as an ex-post facto law by Sec. 10 of Article I of the Constitution.

POINT TWO.

THE PRICE ORDER HAS NO RETROACTIVE APPLICATION.

The Circuit Court, in affirming the judgment of the trial Court, decided that the price order which related only to sales to be made *in futuro* was admissible in evidence and had a retroactive effect of establishing a wholesale ceiling rate on spirits sold some ten months previously despite its clearly expressed pro-

visions to the contrary. In so holding the Courts below have authorized the Price Administrator to maintain a treble damage action he had no power to commence simply by thereafter adopting a new regulation and thereunder issuing a price order fixing maximum sales prices to be made in the future. They have also decided that the Price Administrator is possessed of a retroactive price fixing power creating liability in the sellers for sales made long before the commencement of the suit and before the issuance of the order. Thereby they have legislated into *esse* a new rule of law and evidence violative of Sec. 1 of Article I of the Constitution. Such legislative power has not been delegated by Congress to the Price Administrator or to the Courts. See *Field v. Clark,* 143 U. S. 649.

POINT THREE.

SECTION 205(e) OF THE ACT IS VOID FOR UNCERTAINTY AND FOR DELEGATING LEGISLATIVE POWER.

Under the provisions of Sec. 205(e) of the Act, 50 USCA, Sec. 925(e), the right to sue for treble damages for a claimed overcharge is conferred either upon the purchaser of commodities or upon the Price Administrator. The person who may sue is defined as *"the person who buys such commodity for use or consumption other than in the course of trade or business"*. The Price Administrator has authority to sue only when *"The buyer is not entitled to bring suit or action under this subsection"*.

The statute, Sec. 205(e), is void for being vague, indefinite, uncertain and ambiguous in the following respects: (1) it cannot be ascertained therefrom who the buyer is who may maintain a treble damage action against a seller for a claimed overcharge; (2) whether the buyer must be an ultimate consumer or may be an intermediate consumer or user of the goods sold; (3) the circumstances under which the buyer cannot sue which give rise to a cause of action in the Price Administrator.

The difficulty arises out of the meaning and significance of the phrase conferring a cause of action in a buyer who is "the person who buys such commodity for use or consumption other than in the course of trade or business". The language of the phrase is susceptible of a number of widely divergent interpretations. Entirely different constructions may be placed and have been placed by our Courts upon this phrase in an attempt to ascertain who is entitled to sue and the conditions upon which such a suit depends. It may mean that the person who buys a commodity to use or consume himself at home or elsewhere but not to resell it in the same form in his regular business is entitled to sue as an ultimate consumer. It may mean that a buyer who purchases a commodity to resell the same outside regular business channels is entitled to sue for an overcharge. It may mean almost anything or nothing. The difficulty in construction that has puzzled the Courts arises out of the fact that it cannot be determined whether the words "other

than in the course of trade or business" modify the word "buys" or the words "for use or consumption". Recognizing the infirmity in Sec. 205(e) Congress clarified it by amendment on June 30, 1944, so that it became more apparent as to when the Price Administrator was authorized to sue.

Sec. 205(e) as it read before it was amended on June 30, 1944, is void for being vague, indefinite, uncertain and ambiguous as to whom it authorized to sue for a claimed overcharge and as to what particular acts or standards of conduct would result in liability thereunder. It is also unconstitutional and void for containing an unlawful delegation of legislative power to Courts and juries to declare who is entitled to sue thereunder and also to determine what acts thereunder may be deemed forbidden and give rise to civil liability. See *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81; *Weeds v. U. S.*, 255 U. S. 109; *Tedrow v. A. T. Lewis & Son Dry Goods Co.*, 255 U. S. 98; and *Kinnane v. Detroit Creamery Co.*, 255 U. S. 102, holding unconstitutional the Lever Act of World War I.

The petitioners sold the spirits at retail to purchasers who operated bars and taverns and, in consequence, who did not resell the spirits in packaged form but converted the spirits into mixed drinks and dispensed the latter in the form of "services". Consequently, the purchasers themselves were the ultimate consumers of the packaged goods and as such they alone became entitled to maintain a suit for claimed overcharges to the exclusion of the Price Adminis-

trator under Sec. 205(e) of the Act. The Circuit Court of Appeals disregarded this contention of the petitioners. The point is novel.

POINT FOUR.

RELEASE OF JOINT TORT FEASORS RELEASED PETITIONERS.

An action for treble damages under Sec. 205(e) of the Act sounds in tort and the damages recoverable are remedial in nature and not penal. See *Bowles v. Kroger Grocery Co.* (CCA-Mo.), 141 Fed. (2d) 120; *Kerr v. Congell,* 46 N. Y. S. (2d) 932; *Bristol v. Sun Vacuum Stores,* 42 N. Y. S. (2d) 501; *Regan v. Kroger,* 54 N. E. (2d) 210. The amended complaint joined the petitioners and other codefendants as joint tort feasors. The petitioners were joined and sued as the agents of the wholesaler Schutz under the agency theory created by O.P.A. Regulation No. 445, Art. VI, Sec. 6.3a (4), which since has been superseded but which stated that every agent "shall be considered the agent of the seller and not the agent of the buyer". The amended complaint charged the petitioners jointly sold the spirits and jointly collected the purchase price. The wholesaler Schutz invoiced the goods to the purchasers to whom the petitioners sold the spirits which demonstrates they were his agents. See R. 39, 53, 79, 80, 93, 94 and 219. On June 22, 1944, during the pendency of the suit below, the codefendant Murray A. Schutz, the wholesaler, for a valuable consideration, received from the Price Administrator a covenant not to sue and a compromise and discharge

from liability and was dismissed from the suit. (R. 254.) An attempted reservation was made therein of liability upon the part of the petitioners. While it is true that a covenant not to sue one of several joint tort feasors does not release the others (*Johnson v. Pickwick,* 108 Cal. App. 279), there can be no doubt that a compromise and discharge of one joint tort feasor operates as an unconditional release of all defendants joined as co-tort feasors. *Chetwood v. California National Bank,* 113 Cal. 414, and *Hawber v. Raley,* 92 Cal. App. 701. The compromise and discharge from liability contained in that agreement released the petitioners from liability by operation of law. See *Flynn v. Manson,* 19 Cal. App. 400, holding:

> "A reservation in a release of one of several tort-feasors does not operate to hold the others, as such a provision is void for being repugnant to the legal effect and operation of the release *itself.*"

We also direct attention to the fact that the trial Court rendered its judgment (R. 18) in favor of the petitioners' agents Edward D. Hoffman and Atherton F. Read, exonerating them from liability and that the Circuit Court refused to consider that their exoneration operated as an exoneration of the petitioner principals from liability for the acts of those agents. See *Bradley v. Rosenthal,* 154 Cal. 420.

CONCLUSION.

For the foregoing reasons we submit that a writ of certiorari directed to the Ninth Circuit Court of Appeals should be granted.

Dated, San Francisco, California,
December 20, 1946.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Petitioners.

THEODORE TAMBA,
Of Counsel.

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CITATIONS

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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 813

DENNY MARTINI AND MILDRED MARTINI, INDIVIDUALLY AND DOING BUSINESS AS LAKESIDE CUT-RATE LIQUOR STORE, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The district court rendered no opinion. Its findings of fact and conclusions of law appear at pages 13–16 of the record. The majority and dissenting opinions of the Circuit Court of Appeals (R. 277–295) are reported at 157 F. 2d 35.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 18, 1946 (R. 295–296). The petition for rehearing was denied on September

25, 1946 (R. 296). The petition for a writ of certiorari was filed on December 23, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

Where certain sales of whiskey were subject to a maximum price regulation which required the seller to apply to the Office of Price Administration, before selling, for a method of computation of ceiling prices, and the seller failed to make such application at any time, and the Price Administrator, after instituting a damage action against the seller, issued an order definitely fixing the ceilings for these prior sales:

(1) Whether the exclusive jurisdiction provisions of Section 204 (d) of the Emergency Price Control Act, as amended, required the courts below to assume the validity of the Administrator's order and apply it to the sales to which it was expressly applicable:

(2) If Section 204 (d) be regarded as inapplicable, whether the petitioner, who illegally failed to apply for a method of determination of his maximum prices has standing to assert and is correct in his position, that the Administrator is without power to establish prices applicable to the prior sales:

(3) Whether Section 205 (e) of the Emergency

Price Control Act, before the amendments of 1944, was void for uncertainty and for delegation of legislative power in so far as it defined a buyer who might bring an action for statutory damages based upon overcharges as one "who buys such commodity for use or consumption other than in the course of trade or business:"

(4) Whether the petitioners and the dealer who sold to them were joint tort-feasors and whether the petitioners were released from liability because a release was given to the dealer.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (hereinafter referred to as the Act), and of the General Maximum Price Regulation (hereinafter referred to as the GMPR) are set forth in the Appendix, *infra*, pp. 13–18.

STATEMENT

Petitioners in 1943 sold a quantity of Dunbar's Canadian Whiskey (a three-year-old blended Canadian whiskey) to taverns, bars, liquor stores, markets, and similar purchasers (R. 28, 50, 52, 67, 69, 72, 108). Neither liquor of this particular kind nor a similar commodity had been sold at wholesale during March, 1942, by petitioners or their competitors, nor had petitioners sold any whiskey at wholesale during that month (R. 58,

139–143, 279).[1] Section 1499.2 (a) of the GMPR established maximum prices at the highest price charged by the same seller for the same or a similar commodity during the month of March, 1942. Where this provision was inapplicable, Section 1499.3 (a) provided a formula for converting prices charged by the same seller for comparable commodities during March, 1942, if sold at the same distributive level. Where, as here, none of the foregoing provisions of the GMPR were applicable, Section 1499.3 (c) of that regulation, *infra*, pp. 17–18, provided that the maximum price was to be one established after specific authorization by the Office of Price Administration following application by the seller. No such application was made by petitioners, nor was any authorization given (R. 229). In July and August, 1943, petitioners sold large quantities of Dunbar's Canadian whiskey at prices of $57.50 and $62.50 per case (R. 31, 51, 52, 67, 188), establishing this price themselves without regard to the maximum price regulations.[2]

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[1] The court below stated that petitioners had not sold at wholesale during March, 1942. Evidence to support this statement is contained in the deposition of Denny Martini, the original of which was admitted in evidence at the trial and upon stipulation of the parties and order of the trial court was lodged with the court below during the appeal. Petitioners have not included the deposition in the record in this Court (R. 23–24).

[2] Martini testified that he telephoned the Office of Price Administration to find out the ceiling price, and was told to "make yourself a fair profit and go ahead and sell the whiskey." (R. 223.) His testimony was not believed (Finding of Fact 9, R. 15).

On November 24, 1943, an action for statutory damages under Section 205 (e) of the Emergency Price Control Act, based on overcharges in connection with sales of this liquor was instituted against the petitioners and various other persons from whom the petitioners had purchased the liquor or through whom they had sold it (R. 2–4). Before the trial, the Administrator settled his claim against defendant Schutz, from whom the petitioners had purchased the whiskey, and against Garibotti and Novone, whose contract Schutz had taken over. While the trial was in progress, an Order was issued by the Regional Administrator on June 24, 1944, establishing, *inter alia,* maximum prices for sales of Dunbar's Canadian whiskey made at wholesale by the petitioners prior to August 31, 1943, at $37.61 per case (R. 240–242). The trial court found that the petitioners had sold this whiskey at prices in excess of the maximum prices specified by the Regional Administrator's Order by $15,169.70, and, having found that the petitioners had failed to sustain their burden of establishing that the overcharges were the result neither of wilfulness nor failure to take practical precautions to prevent their occurrence (R. 14), awarded full treble damages, and entered judgment for the Price Administrator in the amount of $45,509.00 (R. 17–18. This judgment was affirmed on appeal by the Circuit Court of Appeals for the Ninth Circuit (Denman, J., dissenting). The majority

of that court reached its conclusion primarily by a consideration of the issue of the validity of the retroactive maximum pricing order, but also indicated that, by virtue of the exclusive jurisdiction provisions of Section 204 (d) of the Act, such issues of validity could be raised only before the Emergency Court of Appeals.

DISCUSSION

In deciding the issues presented concerning the Regional Administrator's Order of June 24, 1944, the decision of the court below can be construed as resting on two grounds: (1) that the issuance of the retroactive provisions of the order constituted a valid exercise of the Price Administrator's power, and (2) that jurisdiction to determine the validity of the order was placed exclusively in the Emergency Court of Appeals by Section 204 (d) of the Emergency Price Control Act, *infra*, p. 14.

The issues presented by this case are almost identical with those of *Senderowitz* v. *Fleming*, now pending on a petition for writs of certiorari, Nos. 677 and 678 at this Term, and the respondent respectfully refers the Court to his Memorandum in that case. For the reasons stated in that memorandum, pages 8–9, we believe the second phase of the decision of the court below is correct, and that the issue involving the alleged invalidity of the retroactive provisions of the pricing order involved in the instant case is therefore

beyond the jurisdiction of the court below to determine, or of this Court to determine in this proceeding. Likewise, we think that the reasoning which it employed with respect to the validity of the order is sound, for the reasons stated on pages 10–12 of our Memorandum in the *Senderowitz* case.[3]

II

The pronouncements of the court below with respect to the validity of the retroactive order of the Regional Administrator may be fairly said to be in conflict with the decision of the Emergency

[3] Petitioners in the instant case also seek to escape the effect of the pricing order involved by asserting that it was prospective only in application. The construction given by both courts below, however, is clearly correct. The ceiling price designated in paragraph (a) of the Order (*infra*, p. 19), expressly covers "sales * * * made prior to August 31, 1943." Furthermore, paragraph (c) of the Order provides the method of pricing for sales made after that date, and hence would conflict with paragraph (a) if the petitioners' construction were correct. Even in the absence of specifically retroactive language such as is here present, a pricing order issued after a seller's failure to make application before selling, was construed in *Porter* v. *Kramer*, 156 F. 2d 687 (C. C. A. 8), to be applicable retroactively as well as prospectively.

Petitioners also assert that their sales were at retail and hence that the measure of damages should not have been computed upon the wholesale ceiling. But the undisputed evidence that the sales in question were made to taverns, bars, liquor stores, markets, and similar purchasers (R. 28, 50, 52, 69, 72, 108), in quantities of as much as five hundred cases per transaction (R. 81, 88), clearly substantiates the conclusions of the courts below.

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Court of Appeals in the case of *Collins* v. *Fleming* (not yet reported), Nos. 352, 353, 357, Emergency Court of Appeals, decided January 2, 1947 (copies of the opinions are being lodged with the Clerk of this Court in the *Senderowitz* case, *supra*), rehearing denied, January 30, 1947, in which the Government contemplates filing a petition for a writ of certiorari in this Court because of the conflict and the importance of the question.

The regulatory provision applicable in the *Collins* case is identical with that in the case at bar, Section 1499.3 (c) of the General Maximum Price Regulation (*infra,* pp. 17–18). In each case, the seller did not apply as required, and in each case, after the Administrator had commenced a suit for damages under Section 205 (e) of the Act he issued an order specifying[4] the maximum prices applicable to the particular sales. The Emergency Court of Appeals held that no such further administrative action was proper; the Circuit Court of Appeals for the Ninth Circuit in the in-

[4] The order in the *Collins* case precisely followed the statement in Section 1499.3 (c) of the GMPR, that the authorization "will be given in the form of an order prescribing a method of determining the maximum price." The Order in the instant case took the additional step, after selecting the method of determination, of computing the prices in terms of dollars and cents. As the court below pointed out (R. 284, 285), the petitioners' rights could scarcely have been prejudiced thereby.

stant case—just as did the Circuit Court of Appeals for the Third Circuit in the *Senderowitz* case [5]—has expressed a contrary view.

For the reasons stated in our Memorandum in the *Senderowitz* case, *supra*, we believe that the decision of the court below is correct and that the decision of the Emergency Court of Appeals in the *Collins* case is wrong, and likewise that resolution of the conflict is sufficiently important to warrant review of the question by this Court. The presence of the jurisdictional issue herein may, however, as we stated in the respondent's memorandum in the *Senderowitz* case, render this case an inappropriate one in which to resolve the conflict. Nevertheless, if this Court is of the opinion that the present case is also an appropriate vehicle for resolution of the conflict, we would not oppose the granting of the writ herein sought with respect to that question and the issue as to the exclusive jurisdiction of the Emergency Court of Appeals.

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[5] The opinion on Petition for Rehearing in the *Collins* case expressly leaves open the question of the validity of a retroactive order issued upon application by the seller. On that basis, a distinction can be drawn between the *Collins* and *Senderowitz* cases, since in the latter a report, under Section 1499.3 (b) (1) of the GMPR (which is analogous to an application under Section 1499.3 (c)), was belatedly filed. No such distinction, however, can be drawn between the *Collins* case and the case at bar, as in neither case did the seller make application at any time.

III

Petitioners contend that Section 205 (e) of the Emergency Price Control Act *infra*, pp. 14–17, before the amendments of 1944,[6] was void for uncertainty and for delegating legislative power to the courts, because it authorized a suit by the buyer when he had purchased "for use or consumption other than in the course of trade or business" and gave the Price Administrator authority to sue where the buyer was not so qualified. It is submitted that this clause of Section 205 (e) is not illegally vague and uncertain. The words "trade" and "business" have been used immemorially in commerce and in the daily affairs of the nation. Their meanings are too well established for it to be said that their use in a provision of law causes it to become illegally vague and uncertain. Furthermore, the clause here involved has been construed and applied many times by the courts without the perplexity suggested by petitioners, and there is unanimity of opinion that a sale to one who purchases a commodity to be used for commercial or business purposes is a purchaser "in the course of trade or business" whether or not he is the ultimate consumer of the product

[6] The situation to which the petitioners' contention on this point is addressed persisted in part even after the 1944 amendments; thenceforth, the Administrator was empowered to bring the action where the purchase had not been for use or consumption in the course of trade or business, only if the buyer had not brought the action within thirty days after the violation.

in the form in which he purchased it. Cf. *Bowles* v. *Seminole Rock & Sand Co.*, 145 F. 2d 482 (C. C. A. 5), reversed on other grounds, 325 U. S. 410; *Speten* v. *Bowles*, 146 F. 2d 602 (C. C. A. 8), certiorari denied, 324 U. S. 877; *Bowles* v. *Rogers*, 149 F. 2d 1010 (C. C. A. 7); *Bowles* v. *Jones*, 151 F. 2d 232 (C. C. A. 10); *Bowles* v. *Trullinger*, 152 F. 2d 191 (C. C. A. 9); *Bowles* v. *Whayne*, 152 F. 2d 375 (C. C. A. 6); *Bowles* v. *Barker*, 155 F. 2d 1022 (C. C. A. 7); *Lightbody* v. *Russell*, 293 N. Y. 492.

Nor is there any merit to petitioners' contention that the release given to defendant Schutz constituted a release of a joint tort-feasor, which should have been held to discharge the petitioners as well. Schutz sold to the petitioners at $35.72 per case, in violation of the Act, and the petitioners sold to a number of retailers, bars, etc., at $57.50 and $62.50 per case, in violation of the Act. These were separate and distinct transactions and violations; each wrongdoer was liable for his respective violations, and the liability of the petitioners and Schutz was in no respect joint. Cf. *Veazie* v. *Williams*, 8 How. 134, 159; *Pittsburgh Rys. Co.* v. *Chapman*, 145 Fed. 886 (C. C. A. 3); *Husky Refining Co.* v. *Barnes*, 119 F. 2d 715 (C. C. A. 9).[7]

[7] Neither is there merit in petitioners' contention that the trial court's exoneration of their agents, Reed and Hoffman, should exonerate them. Petitioners, as sellers, were held liable for their own participation, not on any theory of *respondeat superior*.

CONCLUSION

The judgment of the court below is correct. However, if this Court considers this case a proper vehicle for resolution of the conflict of decisions herein pointed out, we do not oppose the granting of the writ, except as to the issues discussed in Point III hereof. As to those issues the petition should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN R. BENNEY, *Attorney.*

WILLIAM E. REMY,
Deputy Commissioner for Enforcement,
DAVID LONDON,
Director, Litigation Division,
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ALBERT J. ROSENTHAL,
Special Appellate Attorney,
Office of Price Administration.

FEBRUARY 1947.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. *Emergency Price Control Act.*—The pertinent sections of the Emergency Price Control Act, as amended[1] (56 Stat. 23; 58 Stat. 632; 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

Section 2 (*c*). "Any regulation or order under this section may be established in such form and manner, may contain such classification and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *"

Section 2 (*g*). "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

Section 4 (*a*). "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under

[1] Roman type is used to indicate text which has not been changed since original enactment, and italics are used to indicate amendments.

section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 201 (d). "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Section 204 (d). * * * "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

Section 205 (e). "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maxi-

mum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater*: (1) *Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or* (2) an amount not less than *$25 nor more than $50, as the court in its discretion may determine: Provided, however, that such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurence of the violation.*[2] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable*

[2] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

maximum price.[3] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.*[4] *[The amendment made by subsection (b),*[5] *insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the*

[3] Added by sec. 108 (b) of Stabilization Extension Act of 1944.

[4] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

[5] Sec. 108 (c) of Stabilization Extension Act of 1944.

violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]"

2. *General Maximum Price Regulation.*

Section 1499.1 (*a*)—(7 F. R. 3153).

Section 1499.1. "Prohibition against dealing in commodities or services above maximum prices. On and after the effective date of this Regulation, regardless of any contract or other obligation:

"(a) No person shall sell or deliver any commodity and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation; * * *"

* * * * *

§ 1499.2. "The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the Regulation. Such price shall be determined by the seller in accordance with the following procedures: * * *"

§ 1499.3. "Maximum prices for commodities and services which cannot be priced under § 1499.2. * * *

(c). In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a

price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under § 1499.2 or § 1499.3 (a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price" (7 F. R. 7093).

Section 1499.3 (e) (1), as added by Amendment 61 (9 F. R. 5169).

"(e) (1). The Price Administrator, or any Regional Administrator or any State or District Director so authorized by his Regional Administrator, may at any time approve, disapprove or revise maximum prices reported, proposed or established under paragraphs (a), (b) (1), or (c) of this section so as to bring them into line with the level of maximum prices otherwise established by this regulation."

3. *Order of June 24, 1944:*

UNITED STATES OF AMERICA

OFFICE OF PRICE ADMINISTRATION

SAN FRANCISCO REGIONAL OFFICE

Region VII

File No: VIII-3(c)-144

DENNY MARTINI AND MILDRED MARTINI,
dba Lakeside Cut-Rate Liquor Stores,
San Francisco, California.

ORDER UNDER SECTIONS 3 (A) AND 3 (C) OF THE GENERAL MAXIMUM PRICE REGULATION

For the reasons set forth in an Opinion attached hereto and pursuant to authority vested in the Regional Administrator by Sections 3(a) and 3(c) of the General Maximum Price Regulation it is hereby ordered:

(a) The maximum price which Denny Martini and Mildred Martini doing business as Lakeside Cut-Rate Liquor Stores, hereafter referred to as Dunbar's Canadian Whiskey, 90.4 proof, made prior to August 31, 1943, shall be $37.61 per case of 12 fifths, f. o. b. applicants warehouse.

(b) The maximum price which applicants may charge for sales at retail of Dunbar's Canadian Whiskey, 90.4 proof, made prior to August 31, 1943, shall be $50.02 per case of 12 fifths.

(c) For sales of such whiskey made on and after August 31, 1943, applicants shall price in accordance with Maximum Price Regulation No. 445, as amended.

(d) For all sales covered by paragraphs (a), (b), and (c) of this order applicants must maintain the records required by Maximum Price Regulation No. 445, as amended, including those specified in Section 7.9.

(e) This order shall become effective upon its issuance.

(f) This order shall be subject to correction, revocation, or amendment at any time hereafter, either by special order or by any price regulation issued hereafter or by any supplement hereafter issued as to any price regulation, the provisions of which may be contrary hereto.

BEN C. DUNIWAY,
Acting Regional Administrator.

Issued and effective June 24th, 1944.

The accompanying order sets maximum prices on Dunbar's Canadian Whiskey 90.4 proof, in cases of 12 fifths, sold prior to August 31, 1943, by the applicants above named.

Neither applicants or any competitor sold the same or similar whiskey during March 1942.

Applicants did not sell any whiskey at wholesale during March 1942. Consequently they can not determine a maximum price for wholesale sales of this whiskey pursuant to Section 3 (a) of the General Maximum Price Regulation.

The order establishes in addition to a wholesale price a retail price for sales by applicants prior to the effective date of Maximum Price Regulation No. 445. No report has been filed by applicants under Section 3 (a) of the General Maximum Price Regulation covering any of its sales

of this whiskey at retail. In no event would a retail price of more than $50.02 be approved by this office.

The maximum prices established were determined by following the formulas set forth in Maximum Price Regulation No. 445.

BEN C. DUNIWAY,
Acting Regional Administrator.

Issued and effective June 24, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1947